

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEXTEL PARTNERS N.Y.	:	DETERMINATION
(NEXTEL PARTNERS OF UPSTATE	:	DTA NO. 823195
NEW YORK, INC.)	:	
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period January 1, 2003 through August 31, 2006.	:	

Petitioner, Nextel Partners, N.Y. (Nextel Partners of Upstate New York, Inc.), filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period January 1, 2003 through August 31, 2006.

On June 24, 2010 and June 29, 2010, respectively, petitioner, appearing by its employee David Clauser, and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Anita K. Luckina, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by November 8, 2010, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claim for refund of tax paid on the purchase of shelters used to contain telecommunications equipment on the basis that

such shelters are not used directly and predominantly in the provision of telecommunications services for sale and are thus not exempt pursuant to Tax Law § 1115(a)(12-a) .

II. Whether the Division of Taxation properly denied petitioner's claim for refund of tax paid on the purchase of the above-noted shelters on the basis that the shelters do not constitute a capital improvement and thus the exception from tax afforded pursuant to Tax Law § 1105(c)(3)(iii) is not applicable.

FINDINGS OF FACT

1. Petitioner, Nextel Partners, N.Y. (Nextel Partners of Upstate New York, Inc.), provides commercial mobile radio services (mobile telecommunication services) to businesses and residential customers in 32 states. In providing these services, petitioner utilizes telecommunications equipment including radios, controllers and amplifiers, as well as power panels, connecting wiring and backup batteries. This necessary equipment is housed within an enclosure known as a shelter.

2. The shelters, supplied to petitioner mainly by Concrete Systems, Inc. (CSI), are precast 5,000 PSI steel reinforced rectangular enclosures approximately 9' to 12' by 16' to 20' and approximately 10' high. A shelter costs approximately \$28,000.00 and is installed adjacent to a cell tower containing antennae. A shelter is delivered to an installation site as a single unit. Installation is performed by petitioner's agent and consists of bolting the shelter to a concrete pad.

3. The telecommunications equipment contained within a shelter receives, initiates, amplifies, processes, converts, transmits, retransmits, switches or monitors the switching of telecommunications services for sale. The telecommunications equipment contained within a

shelter includes petitioner's equipment and could also include equipment owned or used by other telecommunication services providers.

4. A shelter contains equipment racks or cabinets to hold the telecommunications equipment such as the radios, controllers and amplifiers, as well as a power panel, connecting wiring necessary for the telecommunications equipment to operate, and backup batteries to provide power in the event of an interruption in the regular supply of power. A shelter will also contain heating, ventilation and air conditioning (HVAC) equipment necessary to maintain its interior temperature within a defined range so that the telecommunications equipment within the shelter functions properly and is not damaged.

5. The purpose of a shelter is to protect telecommunications equipment contained therein from the elements, such as rain, wind and snow. The shelter also secures the telecommunications equipment from animals, dust, theft and vandalism.

6. Petitioner submitted timely refund claims covering, together, the period spanning January 1, 2003 through August 31, 2006, and seeking a refund in the aggregate amount of \$357,361.15. Petitioner was also the subject of an ongoing field audit conducted by the Division of Taxation (Division). By a letter dated August 19, 2008, the Division advised petitioner that \$241,561.02 of its claimed refund had been approved, and that the remaining \$115,800.13 amount thereof had been denied.¹

7. Petitioner challenged the Division's denial of the remainder of its refund claim (\$115,800.13) by filing a request for a conciliation conference with the Division's Bureau of

¹ At petitioner's request, the approved amount of the refund claim (\$241,561.02) was to be offset against the proposed net amount then due (\$303,694.46) on the non-sales portion of the ongoing sales tax field audit.

Conciliation and Mediation Services (BCMS). The Division's partial denial of petitioner's refund claim was sustained by a conciliation order (CMS No. 226600) dated May 22, 2009.

8. The parties have agreed that \$20,546.35 out of the \$115,800.13 amount of refund claimed but denied represents tax paid on equipment and other expenses that do not qualify for exemption, and that this amount is not at issue. The parties have further agreed that the resulting \$95,253.78 balance of the refund claimed but denied represents tax paid by petitioner on the purchase of shelters. The parties do not dispute the dollar amount remaining at issue, but rather only disagree as to the taxability of the shelters, with petitioner maintaining that the same are exempt from tax pursuant to Tax Law § 1115(a)(12-a) or, alternatively, pursuant to Tax Law § 1105(c)(3)(iii).

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Tax Law § 1132(c)(1) sets forth a presumption that all sales receipts for tangible personal property are subject to tax "until the contrary is established," and sets the burden of proving the contrary upon the vendor or its customer (20 NYCRR 532.4[a][1]; [b][1]).

B. Tax Law § 1115(a)(12-a) provides an exemption from the tax imposed by Tax Law § 1105(a) for "[t]angible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale" Petitioner seeks this "telecommunications exemption" upon the position that the shelters described above are used directly and predominantly in the provision of telecommunications services for sale. The Division opposes petitioner's claim upon the premise that the shelters are not "inextricable

components of mechanical equipment” operating as “a single, integrated and synchronized system.” Essentially, the Division argues that the shelters are outbuildings housing the equipment that acts or operates together to provide telecommunications services.

C. In *Matter of People’s Telephone Co., Inc.* (Tax Appeals Tribunal, January 16, 2001), the Tribunal considered whether a telephone company’s purchases of pay phone pedestals and enclosures (booths), installed in both indoor and outdoor locations, were exempt from tax pursuant to Tax Law § 1115 former (a)(12), the predecessor to the telecommunications exemption at issue herein. The Tribunal first observed that the subject exemption “seeks to avoid the pyramiding of taxes, i.e., it eliminates the imposition of sales tax on production equipment, leaving the state to collect tax on the ‘finished product,’ which in this case is telephone service.” In the case at hand, analogously, the finished product is telecommunications service. The Tribunal further noted that the exemption had been broadened in 1974 such that in order to be exempted, the tangible personal property was required to be used or consumed “directly and *predominantly*” as opposed to “directly and *exclusively*,” a change perceived as a “major liberalization of the exemption . . . [entailing] a significant loss of revenue for the State and many of its localities” (*id.*, citing Letter from Commissioner of Taxation & Finance to the Governor, May 30, 1974, Bill Jacket A. 9899-B, L 1974, ch 851, p. 22). In approving the exemption for the pedestals and enclosures at issue in *People’s Telephone*, the Tribunal concluded that the pedestals and enclosures have an “active causal relationship” in the production of telephone communication. The Tribunal reasoned that without the security, protection, lighting, conduits for wiring, and secure interface with telephone lines afforded by the pedestals and enclosures, there would be no meaningful reception or initiation of telephone communication

at the pay phone locations, both indoor and outdoor. Significantly, with respect to the matter at issue here, the Tribunal further stated:

the enclosures and pedestals are necessary to the initiation and reception of telephone communication. The items are physically and causally close to the service provided in that they *protect, support and envelop* the other components. Most importantly, the enclosure and pedestal of a pay phone, *when they are deemed of necessity by the exigencies of the location*, are inextricable components of mechanical equipment which operate as a single, integrated and synchronized system with the “admittedly exempt machinery” to initiate and receive telephone communication. (*id.*; emphasis added)

D. Read in a strictly literal manner, a shelter is not itself tangible personal property that receives, initiates, amplifies, processes, transmits, retransmits, switches or monitors the switching of telecommunications services. However, the Tribunal and the courts have taken a broader view of what is encompassed within the items of tangible personal property used or consumed directly and predominantly in allowing or enabling the production of goods or the provision of services for sale to be carried out (including telecommunications services, as here). While statutes creating tax exemptions are to be strictly construed (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 NYS2d 1027 [1975]), and the burden of demonstrating clear and unambiguous entitlement to the exemption claimed rests with the party seeking the exemption (*see Matter of Marriott Family Rests. v. Tax Appeals Tribunal*, 174 AD2d 805, 570 NYS2d 741 [1991], *lv denied* 78 NY2d 863, 578 NYS2d 877 [1991]), they must also be afforded a practical construction (*see Matter of Niagara Mohawk Power Corp. v. Wanamaker*, 286 App Div 446, 144 NYS2d 458 [1955], *affd* 2 NY2d 764, 157 NYS2d 972 [1956]) as opposed to one which is so strained, narrow or literal as to defeat the purpose of the exemption (*id.*, *see Matter of Sumitomo Trust Banking Co. [U.S.A.]*

v. Commissioner of Taxation & Fin., 280 AD2d 706, 708 [2001]; *Matter of Deco Bldrs.*, Tax Appeals Tribunal, May 9, 1991).

E. Consistent with the foregoing approach, and with the Tribunal's reasoning in *People's Telephone*, the shelters are close, integral, dependent and necessary to allow petitioner the capability to carry out its telecommunications services. The shelters purchased by petitioner are situated and installed adjacent to cell towers and thus are all exterior locations. In turn, since the sites are all exterior locations it is obviously necessary for the radios, amplifiers, controllers, and other electronically powered equipment to be housed or enclosed in some manner, for otherwise they would be exposed to the elements and subject to vandalism, degradation and failure, leaving petitioner unable to provide its telecommunications services. Furthermore, the shelters not only house the noted equipment, as well as the power panel, connecting wiring, and backup battery power source, but also create an enclosed space within which to establish and maintain the environment necessary for the radios, amplifiers, controllers and other equipment to operate. In this regard, the shelters include HVAC equipment that keeps the temperature within parameters allowing the equipment to function. Given the exigencies of the locations of the shelters, they not only protect, support and envelop the equipment, but also provide the envelope within which petitioner can establish the environmental conditions necessary to allow for proper and continued functioning of the equipment. In sum, without the enclosure provided by the shelters, petitioner would be unable to provide its telecommunications services, since the unsupported, unsecured and unprotected components and equipment, exposed to the exigencies of location including weather conditions, temperature fluctuations, degradation from exposure, susceptibility to vandalism and theft, and the like, would function for only a minimal period of time, if at all. Accordingly, the shelters purchased by petitioner qualify for the exemption set forth in Tax Law

§ 1115(a)(12-a), and petitioner is entitled to a refund of the tax it paid on the purchase of such shelters (\$95,253.78; *see* Findings of Fact 6, 7 and 8).

F. Given the foregoing conclusion, it is unnecessary to address petitioner's alternative argument premised upon the claim that the shelters constitute capital improvements and thus are not subject to tax.

G. The petition of Nextel Partners N.Y. (Nextel Partners of Upstate New York, Inc.) is hereby granted to the extent indicated by Conclusion of Law E, but is otherwise denied and the Division's letter of refund disallowance dated August 19, 2008, as modified in accordance herewith, is sustained.

DATED: Troy, New York
April 28, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE